United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 75-4046

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents,

AERONAUTICAL RADIO, INC.; AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.; AIR TRANSPORT ASSOCIATION OF AMERICA; AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; THE ASSOCIATED PRESS; COMMODITY NEWS SERVICES, INC.; COMMONWEALTH OF PENNSYLVANIA; GENERAL TELEPHONE COMPANY OF CALIFORNIA, et al.; MCI TELECOMMUNICATIONS CORPORATION, et al.; MUTUAL BROADCASTING SYSTEM, INC.; UNITED PRESS INTERNATIONAL, INC.; and UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Intervenors.

On Petition To Review
An Order Of The Federal Communications Commission

BRIEF FOR PETITIONER AMERICAN TELEPHONE AND TELEGRAPH COMPANY

May 2, 1975

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BRIEF FOR PETITIONER AMERICAN TELEPHONE AND TELEGRAPH COMPANY

AGENCY DECISION BELOW

Petitioner American Telephone and Telegraph Company ("AT&T") seeks review herein of an Order (FCC 75-253) adopted by the Federal Communications Commission on March 4, 1975, released on March 6, 1975 ("Order"). By that Order the Commission summarily rejected 1975 rate increases filed by AT&T on the ground that the tariff filing

was barred by a 1972 rate of return determination by the Commission. Order, paras. 17, 26 (A. 10, 12). The Order is not yet officially reported.[1]

ISSUE PRESENTED FOR REVIEW

Whether the Commission has authority to bar carrier-initiated rate changes on the basis of a rate of return determination for a past period, when a carrier's rates have not previously been prescribed under Section 205 of the Communications Act, and when the Commission has not held hearings or made findings as to the lawfulness of the new rates on the basis of a current evidentiary record.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Communications Act of 1934, as amended, are set forth in full in the statutory addendum to this Brief. Specifically, this case involves the statutory plan for carrier-initiated rate changes under Sections 203-205 of the Communications Act, 47 U.S.C. §§ 203-05. Section 203 permits a carrier to initiate rate changes by filing tariff revisions with the Commission and by providing for an effective date following the specified period of public notice. Section 204 authorizes the Commission to investigate the rate changes and to suspend the effectiveness of the new rates for up to three months, after which the rates become effective by operation of law if the Commission has not concluded its investigation. In that event, Section 204 authorizes the Commission to order the carrier to account for all increased revenues collected under the new rates and to refund any portion of the revenues the Commission might eventually find to have been unlawful. Section 205 authorizes the Commission, after providing full opportunity for hearing and making the requisite findings,

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[1] The Order here under review was issued by the Commission without identification of the agency member who wrote the decision. Commissioners Lee and Hooks issued separate statements partially dissenting from the Commission's action (A. 25, 27), and Commissioner Reid issued a separate concurring statement (A. 26). See pp. 13-14, *infra*.

to "prescribe" the carrier's "charges to be thereafter observed" and to order that the carrier not thereafter collect any charges other than those so prescribed.

STATEMENT OF THE CASE

This is a proceeding to review the Commission's summary rejection of rate increases filed by AT&T on January 3, 1975. The rate increases had been designed to improve AT&T's rate of return on interstate operations to a range of 10½ to 11 percent and would have become effective on March 4, 1975. Order, para. 1 (A. 1). In a Memorandum Opinion and Order, adopted March 4, 1975 in F.C.C. Docket No. 20376, the Commission rejected AT&T's rate increases without holding hearings and without making findings as to the lawfulness of the rates on the basis of an evidentiary record. Order, para. 26 (A. 12). The Commission held AT&T's rate increases *"prima facie"* unlawful for the sole reason that in 1972 in another proceeding the Commission had found 8.5 percent to be AT&T's minimum allowable rate of return under then-existing conditions. Order, para. 15 (A. 9). Construing this finding as a "prescription of Bell's rate of return", the Commission held that the effect "was to bar Bell from filing any rate revisions designed to increase its overall rate of return above the 8.5% level without obtaining the Commission's approval to increase this level. . . ." Order, para. 16 (A. 9).

The effect of the Commission's rejection Order is to require AT&T to obtain the Commission's prior special permission before initiating any rate changes that increase Bell's interstate rate of return. AT&T petitioned this Court for review of the rejection Order because the Commission's special permission requirement violates provisions of the Communications Act that permit carriers to initiate rate changes until and unless the Commission holds hearings and finds the rates unlawful. See 47 U.S.C. §§ 203-04.

Since AT&T is suffering irreparable injury from its inability to place the proposed rate increases in effect, AT&T

moved the Court to expedite briefing and argument in this case. By Order of April 15, 1975, the Court adopted an expedited briefing schedule, pursuant to which this Brief is filed.[2]

Background of the Commission's 1972 Rate of Return Finding

In its rejection Order of March 4, 1975, the Commission referred to a 1972 rate of return finding for AT&T in the Commission's Phase I Decision in Docket 19129,[3] a decision the Commission now characterizes as a "prescription" of AT&T's rate of return that bars carrier-initiated rate changes without the Commission's prior approval. Order, para. 16 (A. 9). At the same time, however, the Commission conceded that its 1972 decision had not prescribed "rates" or a "specific rate structure" for AT&T and that AT&T's rates were "carrier-made." Order, para. 17 and n. 14 (A. 10).

It is AT&T's position that under the Communications Act no rate of return finding for a past period—however it may be characterized—empowers the Commission to reject summarily subsequent carrier-initiated rate changes where the Commission has not previously prescribed the carrier's rates under Section 205 of the Act. Nevertheless, since the Commission's Order here under review refers to its 1972 rate of return decision, we will at the outset briefly review that decision as background to subsequent relevant events.

On January 20, 1971, the Commission instituted a proceeding denominated Docket 19129, for the purpose of investigating increased rates filed by AT&T in November

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[2] At the same time, the Court denied the Commission's motion to transfer this case to the Court of Appeals for the District of Columbia Circuit where appeals of the Commission's 1972 rate of return decision are pending *sub nom., Nader, et al.* v. *FCC*, Nos. 73-1045, 73-2051.

[3] The Docket 19129 Decision is reported at 38 F.C.C.2d 213 (1972), *reconsideration denied*, 42 F.C.C.2d 293 (1973).

1970 and January 1971, with regard to the Bell System's interstate services.[4] The Commission divided its investigation into two separate phases and designated Phase I to deal with what rate of return was then required on AT&T's interstate operations.[5] Evidentiary hearings in Phase I were held between March and June, 1971.

On November 22, 1972, the Commission issued its Phase I Decision ("Docket 19129 Decision") in which it held that "the minimum rate of return that Bell should be permitted to earn on its interstate operations at this time is 8.5% . . . ." 38 F.C.C.2d 213, 245 (1972).[6] In addition, the Com-

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[4] See *AT&T*, 27 F.C.C.2d 149 (1971); 27 F.C.C.2d 151 (1971). The tariffs were filed on behalf of AT&T and the Bell System operating telephone companies (hereinafter sometimes referred to collectively as "Bell"). The rate increases filed in November 1970 were designed to improve Bell's interstate rate of return by generating additional earnings before taxes of $545 million. 27 F.C.C.2d at 152. At the Commission's request, AT&T voluntarily postponed the effectiveness of these increases and on January 14, 1971, filed rate revisions that would increase earnings by $250 million. *Id.* at 154. In instituting Docket 19129, the Commission stated that it would investigate the lawfulness of both tariff filings. *Id.*

[5] 27 F.C.C.2d at 157. Phase II of the investigation (in which hearings are expected to be concluded in July, 1975) involves such matters as the reasonableness of Bell's interstate investment and expenses, the prices of AT&T's manufacturing and supply affiliate (Western Electric) for telephone equipment, and the rate structure for AT&T's long-distance Message Telecommunications Service (e.g., the relative charges for person-to-person calls, operator-assisted calls, and customer-dialed station calls). *Id.* at 155-57.

[6] "Rate of return", the Commission stated, is "a percentage expression of the cost of capital." 38 F.C.C.2d at 226. To determine rate of return, the Commission separated Bell's capital into two categories which it broadly classified as "debt" (e.g., long-term bonds) and "equity" (e.g., capital stock, retained earnings). The Commission then found that Bell's embedded cost of outstanding debt was 6.0 percent at that time and that the current cost of equity under then-existing conditions was 10.5 percent. 38 F.C.C.2d at 229-38. Weighting these costs by the 45 percent debt and 55 percent equity then in Bell's capital structure, the Commission arrived at 8.5 percent as the minimum cost of capital, and hence Bell's minimum allowable rate of return for 1972. 38 F.C.C.2d at 241.

mission provided, as an incentive to improve productivity, that a rate of return of up to 9.0 percent would be considered within the "range of reasonableness" for Bell's interstate earnings.[7] 38 F.C.C.2d at 245.

The Commission's rate of return finding was tied directly to economic conditions in 1971 and 1972. The Commission explained at the outset that the purpose of its Docket 19129 Decision was to determine Bell's rate of return "warranted under current and immediately foreseeable economic and financial circumstances for Bell's interstate and foreign communications services." 38 F.C.C.2d at 227. All witnesses in Phase I testified prior to the close of hearings on June 3, 1971, and all premised their testimony on economic and financial data relating to 1970 and the first half of 1971. 38 F.C.C.2d at 251-63, 264-69. Subsequently, the Commission took official notice of additional financial and economic data which related to periods ending in the first half of 1972.[8] Thus, the Commission's Phase I findings with respect to the costs of Bell's debt and equity were based on a record compiled in 1971 and 1972 and were expressly directed to the level of Bell's capital costs in those years. See 38 F.C.C.2d at 229-238.

At no point in its Docket 19129 Decision did the Commission state that its 1972 rate of return finding would be binding in the future without regard to changes in economic circumstances. Nor did the Commission characterize its decision as a "prescription" of AT&T's rate of return by which the Commission intended to prevent AT&T from

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[7] Since Bell's interstate earnings for 1972 were substantially below 8.5 percent, AT&T filed rate increases in January 1973 designed to produce additional earnings of $145 million before taxes—the amount the Commission estimated as necessary to raise interstate rate of return to the minimum level of 8.5 percent. See 38 F.C.C.2d at 251.

[8] By order of July 24, 1972, the Commission took official notice of the cost of Bell's long-term debt through June 13, 1972 and Bell's actual operating results through the first five months of 1972. 36 F.C.C.2d 491 (1972). Also, in August 1972, AT&T submitted additional updated financial and economic data, which the Commission officially noticed in its Docket 19129 Decision. See 38 F.C.C.2d at 220, 263-64.

initiating subsequent rate revisions when changed conditions caused increases in Bell's cost of capital. In fact, the Commission's only reference to a "prescription" of rate of return came in a later opinion denying various petitions for reconsideration of the Docket 19129 Decision and had nothing to do with the future effect of that rate of return decision. 42 F.C.C.2d 293, 300 (1973).[9]

Indeed, the Commission made it clear that AT&T's rates filed after the Docket 19129 Decision were entirely carrier-made and had not been prescribed by reason of the 1972 rate of return finding.[10] The Commission noted, for ex-

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[9] The terms "prescribed" and "prescription" appeared in only two sentences in the Commission's opinion denying reconsideration. The use of the terms arose in the context of responding to arguments about whether AT&T's January 1973 tariff filing was reasonably designed to produce $145 million additional revenues before taxes, thereby raising Bell's interstate rate of return to 8.5 percent. 42 F.C.C.2d at 299-300. In the context of rejecting the argument that AT&T's tariff filing might produce more revenues than estimated, the Commission stated:

> "In our Decision of November 22, 1972, we authorized rates which, as of the time of the filing, would produce a return of 8.5%—the lower part of the 8.5-9.0% range of reasonableness *prescribed* by that Decision." *Id.* (emphasis supplied).

The Commission further affirmed its earlier holding that AT&T's rates were reasonably designed to produce a return of 8.5 percent, stressing that no tariff filing could guarantee exactly 8.5 percent and that such exactitude "was not the reason for our *prescription* of 8.5-9.0% as the range of reasonableness." *Id.* at 300 (emphasis supplied).

Thus, the Commission's entire discussion was directed to AT&T's earnings under conditions existing at the time of the Docket 19129 rate of return finding, and the term "prescribe" was used synonymously with "specify" or "determine." The Commission's use of the term does not appear as a formal prescription of AT&T's "charges to be thereafter observed" pursuant to Section 205 of the Communications Act (47 U.S.C. § 205).

[10] "Carrier-made" rates are to be contrasted with "Commission-made" or "agency-made" rates which have been prescribed pursuant to Section 205(a) of the Communications Act (47 U.S.C. § 205) or comparable regulatory authority. Under the doctrine of *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 390 (1932), agency-made rates, unlike carrier-made rates, are not subject to refund or reparations. See pp. 34-35, *infra*.

ample, that when AT&T filed rate increases after the Docket 19129 Decision, AT&T had not been required "to make a *prima facie* showing of lawfulness on penalty of summary rejection." 42 F.C.C.2d at 300. The Commission expressly refused to find "as a matter of law that [AT&T's] new rate schedules were just, reasonable, and free of undue discrimination within the meaning of Sections 201-202 of the Communications Act." *Id.* at 301. Rather, the Commission ordered that the rate increases were to take effect subject to refund pending the conclusion of the Commission's investigation of the issues in Phase II of Docket 19129. See 38 F.C.C.2d at 251; 38 F.C.C.2d 984, 985 (1973).

AT&T's January 3, 1975 Tariff Filing

In the period following the Commission's 1972 rate of return decision, there have been dramatic changes in financial and economic conditions that sharply increased the costs of AT&T's operations and the costs of attracting new capital. Most significantly, the economy has experienced severe inflation since 1972 that reached a rate of about 12 percent in 1974 (A. 19, 53, 67-69). By contrast, the Commission made its rate of return findings in Docket 19129 at the time of the National Economic Stabilization Program when expectations for the annual rate of inflation were about three percent (A. 19, 51, 67-69).

This inflationary spiral has caused significant rises in AT&T's operating expenses and costs of construction (A. 18-19). The labor costs alone for the Bell System's interstate operations were estimated to be $375 million to $525 million higher in 1975 than they would have been under the wage levels existing prior to the Bell System labor agreements concluded in August and September of 1974 (A. 19, 401-02). Indeed, without revenue relief, Bell's 1975 interstate earnings were forecast to fall substantially below even the 8.5 percent minimum return required to attract capital in 1972 (A. 19, 403-04). Moreover, current economic and financial conditions have caused a dramatic upsurge in interest rates and the cost of Bell's capital over 1972 levels (A. 19-20, 48-57, 67, 70, 72-74). See Order, para. 19 (A. 10).

Thus, as a consequence of these pressures on Bell's cost of operations and costs of attracting capital, AT&T on January 3, 1975 filed with the Commission tariff revisions providing for generally increased charges for the Bell System's principal interstate services, to be effective March 4, 1975 (A. 18, 29-30).[11] The filed tariffs were designed to produce annual increased revenues (before taxes) from Bell's interstate services in the amount of about $717 million (A. 22, 30). The rate changes provided for about a 7.2 percent net revenue increase for AT&T's long-distance Message Telecommunications Service (MTS), Wide Area Telecommunications Service (WATS), and private line services.[12] Order, para. 1 (A. 1).

This tariff filing was AT&T's first general interstate rate increase since the Commission's 1972 decision, and since that decision the Consumer Price Index had risen more than 20 percent (A. 19, 68). In fact, this was only the second time since 1953 that AT&T had found it necessary to initiate a general interstate rate increase, and even with the January 1975 filing in effect, long-distance rates would have remained at about their 1953 level (A. 18, 21).[13]

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[11] The tariffs were filed on behalf of AT&T and the Bell System operating telephone companies. The tariff filing provided for an effective date of March 4, 1975, thus allowing 60 days' notice to the public and the Commission in accordance with the requirements of Commission Rule 61.58. 47 C.F.R § 61.58.

[12] The new rate schedule for MTS contained several innovations that would actually permit substantial savings to customers on many long-distance calls (A. 20-21). For example, a new one-minute initial period was substituted for the former three-minute initial period. Since about one-third of all dial station-to-station calls are two minutes or less, customers would generally pay less for those calls under the new MTS schedule than under the former rates (A. 21).

[13] The rates for many long-distance calls would actually have been less under the new MTS schedule than in 1953. A three-minute station-to-station call in the evening from New York City to Los Angeles, for example, cost the customer $2.00 in 1953, while under the MTS schedule filed on January 3, 1975, the same call if dialed directly would have cost only $.94 in the evening and only $.58 during weekend hours (A. 21, 23).

The purpose of the filed rate increases was to raise AT&T's rate of return on its interstate operations from a level of about 7.9 percent expected in 1975, without rate relief, to a range of 10½ to 11 percent. See Order, para. 7 (A. 4, 403-04). As detailed in the voluminous supporting material submitted with the new tariffs, this range represents Bell's cost of capital under current economic and financial conditions, and is the minimum level of earnings required in 1975 to attract necessary capital and maintain the financial integrity of existing investment in the enterprise (A. 20, 66).[14]

AT&T submitted with its tariff filing a variety of data which related to current economic and financial conditions and which set forth in particular the changes in AT&T's costs of capital since the Commission's 1972 rate of return decision (A. 19-20, 48-80).[15] AT&T pointed out, for example, that in the last six months of 1974 the cost of new long-term debt consistently exceeded 9 percent—substantially higher than the 7¼ to 7½ percent level upon which the Commission premised its rate of return finding in Docket 19129 and which the Commission in 1972 predicted would continue for the "immediately foreseeable future" (A. 19-20, 49-50, 67, 70-73). See 38 F.C.C.2d at 230-31. Similarly, Bell's embedded cost of debt had risen to about 6.9 percent by the beginning of 1975—nearly a full percentage point higher than the 6.0 percent the Commission in 1972 expected would "not significantly increase" in the immediately foreseeable future (A. 11, 19-20, 50). See 38 F.C.C.2d at 230. Concurrently with these changes in the cost of Bell's

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[14] To fund its 1975 construction program of about $10 billion, AT&T and the Bell System telephone companies must raise some $3 billion in outside capital in 1975 (A. 19).

[15] In support of its filing, AT&T submitted 35 volumes of data showing Bell's current cost of capital and setting forth details as to the traffic, revenue, and cost effects of the filed rate changes (A. 30, 42-44). These data were submitted in full compliance with the tariff filing requirements of the Commission's Rules. See 47 C.F.R. § 61.38.

debt, the cost of attracting equity capital has risen sharply since 1972, reflecting the fact that equity investors can be attracted only if they can obtain market returns on equity substantially above the returns available on more secure debt issues (A. 20).[16]

Several parties, mostly business customers of AT&T's private line services, filed a number of pleadings protesting the higher rates in the January 3, 1975 tariff filing (A. 16-17). These customers requested the Commission to suspend and investigate the rate increases, and in some cases also requested rejection or cancellation of the rate changes without an evidentiary hearing. Order, para. 9 (A. 5).

The Commission's Rejection Order of March 4, 1975

The Commission did not act on AT&T's filed rate increases until February 27, 1975—only a few days before the rates were to become effective—when it issued a brief announcement that the Commission had "rejected" the tariff filing. As its reason for rejection, the Commission asserted that its 1972 decision in Docket 19129 had "prescribed" an 8.5 percent rate of return for Bell's interstate operations which could not be exceeded. Report No. 1751 (A. 474). This was the first time in the Commission's 41-year history that carrier-initiated rate increases had been summarily rejected, without hearings and findings, on grounds that the rates would produce earnings above a rate of return determined for a prior period.

On March 4, 1975, the Commission adopted a Memorandum Opinion and Order (FCC 75-253), released March

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[16] Indeed, certain conditions that led the Commission to recognize an urgent need for an increase in AT&T's return on equity in 1972 had not improved by 1975. For example, the interest coverage on Bell's debt and the market-book relationship of AT&T stock (both of which the Commission found inadequate in 1972, 38 F.C.C.2d at 233-35) had deteriorated even further by 1975 (A. 20, 50, 67, 74, 77).

6, 1975, in which the Commission set forth its formal Order rejecting AT&T's tariff filing. Order, para. 26 (A. 12). The only ground asserted for rejecting the rate changes was the Commission's 1972 rate of return finding. The Commission held that AT&T could not, without the Commission's prior special permission, initiate rate increases that would produce earnings above the 8.5 percent level the Commission had found appropriate for 1972 in its Docket 19129 Decision. Order, para. 16 (A. 9).

The Commission admitted in its rejection Order that in its Docket 19129 Decision it had not prescribed any "rates" or "specific rate structure" for AT&T. Order, para. 17 and n. 14 (A. 10). Further, the Commission conceded that AT&T's rates put in effect following the 1972 rate of return decision were "carrier-made". Order, para. 17, n. 14 (A. 10). The Commission also acknowledged that its 1972 decision had been "based on the then-prevailing costs of capital." Report No. 1751 (A. 474); Order, para. 16 (A. 9).

Nevertheless, the Commission now regarded its 1972 finding as a "prescription of Bell's rate of return" and held that "[t]he effect of this action [in 1972] was to bar Bell from filing any rate revisions designed to increase its overall rate of return above the 8.5% level without obtaining the Commission's approval to increase this level by demonstrating that the level was no longer adequate." Order, para. 16 (A. 9).

The Commission did acknowledge that economic and financial conditions had "changed significantly" since its 1972 "prescription" of an 8.5 percent return. Report No. 1751 (A. 474); Order, para. 19 (A. 10). It observed that these changes had increased AT&T's cost of embedded debt. Order, para. 20 (A. 11). In recognition of the increased cost of Bell's debt, the Commission "prescribed" a new rate of return of 8.74 percent and granted AT&T authority to file rate increases that would produce additional reve-

nues of $365 million. Order, paras. 21, 22, 28 (A. 11, 12). The Commission stated, however, that without an evidentiary hearing it could not determine whether, or to what extent, there had also been an increase in AT&T's cost of equity. Order, para. 20 (A. 11). Thus, the Commission instituted a new proceeding, denominated Docket 20376, to deal with this question and stated that only after hearings were completed in that docket would the Commission allow AT&T to initiate rate changes that might exceed the "prescribed" rate of return. Order, paras. 20, 27 (A. 11, 27).[17]

In separate statements, three of the seven Commissioners expressed serious doubts as to the propriety of the Commission's action (A. 25-28). Commissioners Lee and Reid stated their concerns that the Commission was misapplying its 1972 rate of return decision inasmuch as the Commission had then found 9.0 percent to be the upper range of reasonableness for AT&T's earnings, whereas in 1975 the Commission was preventing AT&T from earning even at that level (A. 25, 26). Commissioner Lee, in his partial dissent, particularly expressed his reservations about the advice by the Commission's staff that the Docket 19129 Decision in 1972 "has legally bound the Commission to hold AT&T to an 8.5 percent rate of return" (A. 25). In Commissioner Lee's view, such a conclusion about the effect of the 1972 rate of return finding has widespread implications as to the Commission's ability to respond to matters affecting the public interest in assuring adequate telecommunications services (A. 25).

In a separate dissenting statement, Commissioner Hooks also expressed his disagreement with what he found to be a change in the meaning of the Commission's Docket 19129 Decision two years after the fact (A. 27). Commissioner

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[17] The Commission stated that it would hold expedited hearings in Docket 20376 and that it expected these hearings would take about nine months to complete. Order, para. 20 and n. 15 (A. 11).

Hooks pointed out that the Commission in Docket 19129 admittedly had not prescribed AT&T's specific rates within the meaning of Section 205 of the Act. Further, he found it unlikely that an 8.5 percent return could have been "prescribed" in 1972, because a rate of return finding for a past period is not "readily amendable to finite 'prescription'" for the future because of the many "fluid contingencies" that underlie such a determination (A. 27).[18] Commissioner Hooks concluded that, in any event, the proper procedure for adjudicating AT&T's claim to a higher rate of return is to follow the explicit scheme of regulation set forth in Sections 203 and 204 of the Communications Act under which carriers initiate rate increases and, after the statutory period of suspension, collect the increased charges subject to possible refund following the Commission's investigation of the higher rates (A. 27-28).

Thus, with its January 3 tariff filing rejected, AT&T on March 7, 1975 filed with the FCC tariff revisions that would produce additional revenues of about $365 million annually as allowed by the Commission's Order.[19] These tariffs

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[18] Commissioner Hooks stressed that the Commission's statutory authority under Section 205 of the Communications Act does not include the power to "prescribe" a rate of return that would prevent subsequent carrier-initiated rate changes. He pointed out that Section 205 relates to the prescription of "charges", not rate of return:

> "Instead, the 'prescription' (if any) would have been the 'charges' underlying the subject rate of return; and, in this respect, my notion is confirmed by the clear language of our statutory 'prescription' authority which states that 'the Commission is authorized and empowered to determine and *prescribe* what will be the just and reasonable *charge* or the maximum or minimum or maximum and minimum *charge* or *charges* to be thereafter observed. . . . 47 U.S.C. § 205(a)." (Emphasis by Commissioner Hooks.) (A. 27).

[19] AT&T stated in its letter of transmittal of March 7, 1975, that its new tariff filing should not be considered as a waiver of AT&T's position that "there was no lawful basis for the Commission to reject the carrier-initiated rate revisions" in AT&T's January 3, 1975 filing.

were scheduled to, and did, become effective on March 9, 1975. The additional revenues that AT&T and the associated Bell System telephone companies are collecting under this March 7 tariff filing are over $950,000 less each day than would have been collected under the tariffs rejected by the Commission. The Commission's rejection Order is causing AT&T to lose this revenue irretrievably, because under the Communications Act a carrier cannot recover revenues retroactively even if the Commission eventually permits additional rate increases.[20]

ARGUMENT

I. THE COMMISSION'S REJECTION ORDER CONTRAVENES THE EXPLICIT STATUTORY SCHEME OF CARRIER-INITIATED RATES SET FORTH IN THE COMMUNICATIONS ACT.

In its Order here under review the Commission summarily rejected the carrier-initiated rates filed by AT&T on January 3, 1975 without holding hearings and making findings as to the lawfulness of the new rates on the basis of an evidentiary record. The Commission held that the effect of its 1972 determination of Bell's rate of return is "to bar Bell from filing any rate revisions designed to increase its overall rate of return" above a level previously determined by the Commission unless the carrier "obtain[s] the Commission's approval to increase this level by demonstrating that the level was no longer adequate." Order, para. 16 (A. 9).

The Commission thus construed the statutory scheme of regulation under the Communications Act to require the prior special permission of the Commission before a carrier may initiate rate changes increasing its rate of return. This action contravenes the explicit statutory

[20] Under the Communications Act, a carrier can only collect rates contained in a filed and effective tariff during the period in which service was rendered. 47 U.S.C. § 203(c).

scheme of carrier-initiated rates set forth in the Communications Act of 1934.

Under the Communications Act there is no requirement that carriers obtain the advance approval of the Commission before initiating changes in carrier-made rates.[21] Carriers retain the right to make tariff revisions under the statutory plan unless and until the Commission holds hearings and finds the rates unlawful. 47 U.S.C. §§ 203-204.

Under the Act, carriers may initiate rate changes by filing new tariffs with the Commission pursuant to Section 203, and by providing in the tariffs for a future effective date following a specified period of notice to the Commission and the public. 47 U.S.C. § 203.[22] The Commission is empowered by Section 204 of the Act to suspend the effectiveness of the new rates for a period not to exceed three months and to order an investigation of the new rates. 47 U.S.C. § 204.[23] But Section 204 also provides that if the

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[21] See *American Telephone and Telegraph Co.* v. *FCC*, 487 F.2d 865 (2d Cir. 1973).

[22] Section 203(a) provides in relevant part that every common carrier shall "file with the Commission . . . schedules showing all charges for itself and its connecting carriers for interstate . . . communication . . . and each such schedule shall give notice of its effective date. . . ." Section 203(b) provides: "No change shall be made in the charges . . . . which have been so filed and published except after thirty days' notice to the Commission and to the public. . . ." The complete text of Section 203 is set forth in the statutory addendum hereto.

[23] Section 204 provides in relevant part:

"Whenever there is filed with the Commission any new charge, . . . the Commission may . . . enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, . . . may suspend the operation of such charge, . . . but not for a longer period than three months beyond the time when it would otherwise go into effect. . . . If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change . . . shall go into effect at the end of such

investigation of the new rates "has not been concluded and an order made within the period of the suspension, the proposed change . . . *shall go into effect at the end of such period*". 47 U.S.C. § 204 (emphasis supplied). Pending the conclusion of the investigation, the Commission may order the carrier to account for all increased revenues collected under the new rates so that refunds may be made if the rates are eventually held to be unlawful. 47 U.S.C. § 204. Only after full opportunity for hearing and after the Commission has made the requisite statutory findings, may the Commission "prescribe" a carrier's "charges to be thereafter observed" and order that the carrier "not thereafter publish, demand, or collect any charge other than the charge so prescribed. . . ." 47 U.S.C. § 205(a).[24]

This Court held squarely in 1973 that the Commission has no authority to bar changes in carrier-made rates unless,

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period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, . . . and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified."

The complete text of Section 204 is set forth in the statutory addendum hereto.

[24] Section 205(a) provides in relevant part:

"Whenever, after full opportunity for hearing, . . . the Commission shall be of opinion that any charge . . . of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed . . . and to make an order that the carrier or carriers . . . shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed. . . ."

The complete text of Section 205 is set forth in the statutory addendum hereto.

within the time required for notice under Section 203 of the Act and suspension under Section 204, the Commission has conducted an investigation and found the newly-filed rates unlawful. *American Telephone and Telegraph Co.* v. *FCC*, 487 F.2d 865, 871-72, 880-81 (2d Cir. 1973) (hereinafter sometimes referred to as the "*AT&T Special Permission Case*"[25]). In that case the FCC had promulgated a general requirement that AT&T obtain "special permission" from the Commission prior to filing any tariff revisions. The Commission asserted that the special permission requirement was authorized by a claimed broad inherent power to regulate communications carriers and also by specific sections of the Communications Act. This Court, however, rejected such contentions, giving detailed consideration to the explicit statutory scheme of regulation in the Communications Act, and holding that the Commission's use of a special permission requirement to block carrier-initiated rate changes was "contrary to the statutory plan". *Id.* at 872.

At the outset of its opinion, the Court stated that "[t]he Communications Act of 1934 . . . does not require carriers to obtain the approval of the Commission before making changes in their rates." *Id.* at 871. The Court emphasized that "Sections 203 through 205 of the Act . . . establish precise procedures and limitations concerning the Commission's processing of carrier initiated rate revisions." *Id.* at 873. In striking down the Commission's attempt to avoid the precise statutory scheme, this Court held:

> "There is no regulatory authority granted to the Commission . . . which permits it to circumvent the statu-

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[25] The purpose of this denotation is to distinguish the 1973 case from two other cases decided by this Court involving the same parties: *American Telephone and Telegraph Co.* v. *FCC*, 449 F.2d 439 (2d Cir. 1971) (which involved the requirements for prescription under Section 205 of the Communications Act), and *American Telephone and Telegraph Co.* v. *FCC*, 503 F.2d 612 (2d Cir. 1974) (which involved the notice requirements for filing tariff changes under Section 203 of the Communications Act).

> tory plan of carrier initiated rate changes, a limited suspension period, rate refunds and rate prescriptions only after a full hearing and specific findings." *Id.* at 875.

The Supreme Court has similarly construed the Interstate Commerce Act, from which the rate-making provisions of the Communications Act were taken.[26] *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963). In these cases the Supreme Court confirmed the principle that carrier-initiated rate changes must be allowed to take effect if the agency has not finally determined their lawfulness within the maximum period of suspension provided in the statute.

Similarly, under analogous provisions of the Natural Gas Act,[27] the Supreme Court has held that the statute gives the regulated company "the right in the first instance to change its rates as it will." *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 113 (1958). The statute "comes into play . . . only" by requiring notice, permitting FPC review of the changes, and authorizing a limited suspension of the new rates "pending a determination of the lawfulness of the rates as changed." *Id.*[28]

Despite the Supreme Court's recognition that Congress has accorded regulated companies the statutory right to initiate rate changes, the Commission in its instant rejec-

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[26] Sections 203-205 of the Communications Act are directly patterned after provisions of the Interstate Commerce Act. See *AT&T Special Permission Case*, 487 F.2d at 873-74 and n. 17 ("Portions of the Communications Act track the Interstate Commerce Act"); S. Rep. No. 781, 73rd Cong., 2d Sess. 2, 4 (1934); H. Rep. No. 1850, 73d Cong., 2d Sess. 5-6 (1934).

[27] The notice, suspension and prescription powers of the Federal Power Commission under the Natural Gas Act are substantially similar to those of the FCC under the Communications Act. See *AT&T Special Permission Case*, 487 F.2d at 877 and n. 27.

[28] See also *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 343 (1956).

tion Order violated the express provisions of the Communications Act dealing with carrier-initiated rates. Instead of suspending the rates and ordering an investigation of their lawfulness, as provided in Section 204, the Commission summarily rejected the rate changes. The Commission then initiated a hearing as to AT&T's current return requirements, with no time limitation other than a statement that it expected the hearing would last about nine months. Order, para, 20, n. 15 (A. 11). Only *after* that hearing is completed might the Commission allow AT&T to initiate rate changes that would permit the carrier to make any further improvements in its interstate earnings level.

The Commission has completely turned around the statutory scheme of carrier-initiated rates. The Commission's Order now sets up an unprecedented procedure whereby the completion of hearings without any time limit is required before a carrier may file rates that would produce a higher earnings level.

Thus, by administrative fiat, the Commission has contravened the explicit statutory plan of the Communications Act: it has not only prevented the carrier from initiating rate changes but also has unlawfully expanded the maximum statutory suspension period of three months. 47 U.S.C. § 204. See *AT&T Special Permission Case,* 487 F.2d at 879-80; *Arrow Transportation Co.* v. *Southern Ry., supra,* 372 U.S. at 665-66; *United States* v. *SCRAP, supra,* 412 U.S. at 697.

The "precise procedures and limitations" with respect to Commission authority set forth in the Communications Act reflect Congress' careful balance and compromise of competing interests which the courts and the administrative agencies cannot disregard. *AT&T Special Permission Case, supra,* 487 F.2d at 873; *Arrow Transportation Co.* v. *Southern Ry., supra,* 372 U.S. at 668; *United States* v.

SCRAP, supra, 412 U.S. at 697.[29] The Supreme Court in *SCRAP* construed the Interstate Commerce Act to preclude any departure from the limitations established by Congress for suspending the effectiveness of carrier-made rates. It held that the rate regulation provisions of the Interstate Commerce Act represent "a careful accommodation of the various interests involved." *Id.* The Court stated:

> "The suspension period was limited as to time to prevent excessive harm to the carriers, for the revenues lost during that period could not be recouped from the shippers. On the other hand, Congress was aware that if the Commission did not act within the suspension period, then the new rates would automatically go into effect and the shippers would have to pay increased rates that might eventually be found unlawful. To mitigate this loss, Congress authorized the Commission to require the carriers to keep detailed accounts and eventually to repay the increased rates if found unlawful." (412 U.S. at 697.)

To allow interference with this statutory pattern, the Supreme Court held, "would disturb this balance of interests" set forth in the regulatory statute. *Id.*

Noting that Section 15(7) of the Interstate Commerce Act is a "cognate provision" of the rate regulation sections of the Communications Act (487 F.2d at 873), this Court in the *AT&T Special Permission Case* found the Supreme Court's rationale and language in *SCRAP* to be equally applicable to the FCC's scope of authority under the Communications Act:

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[29] The foundation of the Supreme Court's decisions in *Arrow* and *SCRAP* was the determination that Congress had explicitly and deliberately granted the agency a limited suspension power with a fixed maximum "overall period for which the Commission might order a suspension." *Arrow Transportation Co.* v. *Southern Ry., supra,* 372 U.S. at 665.

> "The ratemaking provisions of the Communications Act were intended to provide for orderly processing of proposed rate revisions. See *United States* v. *SCRAP, supra,* 412 U.S. at 697. In balancing the various interests involved, Congress provided the comprehensive statutory plan discussed above. The Commission is not authorized to circumvent this statutory scheme by making its own equitable adjustments." (*Id.* at 881.)

Congress sought by enacting Sections 203 and 204 of the Communications Act to achieve a careful balance of interests in the regulation of carrier-initiated rate changes. Accordingly, the Commission's authority with respect to such rates is expressly circumscribed by those sections and for the Commission to be allowed any broader power "would frustrate the specific Congressional purpose sought to be achieved by the Act's precise statutory scheme." 487 F.2d at 876.[30]

The Commission was empowered by the statute to institute an investigation into the lawfulness of AT&T's January 3, 1975 tariff filing, and to suspend the effectiveness of the rates for a period not to exceed three months after the 60-days' notice period. 47 U.S.C. § 204. If the Commission had not completed hearings within the suspension period, the Communications Act provides that AT&T's tariff filing becomes effective "by operation of law". *AT&T* v. *FCC, supra,* 503 F.2d at 614; *AT&T Special Permission Case, supra,* 487 F.2d at 871. Thus, if the Commission had complied with the statute's explicit delegation of power, AT&T's January 3, 1975 tariff filing would have become effective no later than June 4, 1975, the end of the maximum suspension period.

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[30] In 1974 this Court reaffirmed that "Congress has provided a comprehensive and careful statutory plan for rate increases." *American Telephone & Telegraph Co.* v. *FCC, supra,* 503 F.2d at 618 (2d Cir. 1974).

However, the Commission chose to circumvent the statutory scheme by rejecting AT&T's carrier-made rates because AT&T had not obtained the Commission's approval to file rate changes. This amounts to the imposition of a special permission requirement like that struck down two years ago by this Court.

The Commission, as the Court held in the *AT&T Special Permission Case,* cannot ignore or circumvent the statutory plan of carrier-initiated rates "on the basis of its own conception of the equities of a particular situation." 487 F.2d at 880. Congress did not intend by the Communications Act to grant unlimited legislative discretion to the FCC, but rather intended to establish a "specific statutory basis" for Commission action. 487 F.2d at 872.[31] The Commission is not free to disregard the statutorily limited suspension period and requirement of full hearing prior to its adjudication of the lawfulness of new rates.[32] These pro-

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[31] This Court there cited *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 90 (1953), where the Supreme Court stated: "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." Neither the courts nor the Commission has the legislative authority "to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process." *FPC* v. *Texaco Inc.,* 417 U.S. 380, 400 (1974).

[32] The Commission has only those specific powers delegated to it by Congress and cannot exceed those powers upon claimed policy considerations or administrative expediency. See e.g., *Federal Maritime Commission* v. *Seatrain Lines, Inc.,* 411 U.S. 726, 731-36 (1973); *FCC* v. *American Broadcasting Companies, Inc.* 347 U.S. 284, 296-97 (1954); *GTE Service Corp.* v. *FCC,* 474 F.2d 724, 732-36 (2d Cir. 1973); *Textile and Apparel Group, American Importers Ass'n* v. *FTC,* 410 F.2d 1052, 1055-56 (D.C. Cir.), *cert. denied,* 396 U.S. 910 (1969); *Mississippi River Fuel Corp.* v. *FPC,* 202 F.2d 899, 902-03 (3d Cir. 1953).

visions in the Communications Act are essential elements of the regulatory plan devised by Congress to best safeguard the interests of the public and carriers alike.[33]

As with the Commission's unlawful imposition of a general special permission requirement, AT&T will be irreparably injured by the Commission's failure to abide by the statutory plan. The Commission has again created the situation that led this Court to observe:

> "[I]t is abundantly clear to us that the statutory scheme of the Communications Act reflects the realization of Congress that when a carrier is prevented from placing in effect new rate increases it may suffer irreparable loss which in turn may impede the provision of adequate service during a period of rising costs." (487 F.2d at 873-74)[34]

In so holding, this Court cited (487 F.2d at 874) the decision of the Supreme Court in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103, 113 (1958), which held that in establishing a statutory plan of carrier-initiated rates Congress was "manifesting its concern for the legitimate interests of [utility] companies in whose financial stability the [consuming] public has a vital stake". As the Supreme Court recognized (*id.*):

> "Business reality demands that [utility] companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the mainte-

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[33] *United States* v. *SCRAP, supra,* 412 U.S. at 697; *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division, supra,* 358 U.S. at 113; *American Telephone & Telegraph Co.* v. *FCC,* 449 F.2d 439, 450-53 (2d Cir. 1971); *Associated Press* v. *FCC,* 448 F.2d 1095, 1104 (D.C. Cir. 1971).

[34] See also *United States* v. *SCRAP, supra,* 412 U.S. at 697, where the Supreme Court recognized that the carrier suffers irreparable losses when it is prevented from putting new rates into effect.

nance and expansion of their systems through equity and debt financing would become most difficult, if not impossible."

Moreover, this concern for maintaining the financial integrity of regulated utilities "was surely a proper one for Congress to take into account in framing its regulatory scheme." *Id.* at 113-14. In statutorily limiting the suspension period, Congress ensured that regulated utilities serving the public would not be deprived of funds necessary to continue to provide service during periods of rising costs.[35] By contrast, if the Commission could investigate the lawfulness of new tariff filings without regard to any time limitations on the rates taking effect, it could paralyze a carrier's ability to respond adequately to rapidly changing economic conditions.[36]

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[35] The Supreme Court has consistently acknowledged the public's interest in assuring the financial health of regulated utilities. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division, supra,* 358 U.S. at 113; *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944); *FPC* v. *Memphis Light, Gas & Water Division,* 411 U.S. 458, 474 (1973) ("[R]ates are 'just and reasonable' only if consumer interests are protected and if the financial health of the [regulated utility] in our economic system remains strong.").

[36] When the Commission has previously made a rate of return determination and a carrier files new rates, the statutory plan of notice and suspension gives the Commission five months to act upon the filing before the rates must automatically take effect. If conditions have not in fact changed significantly from those existing at the time of the previous rate of return decision, the Commission would have no difficulty in completing its investigation within five months, particularly with the carrier having the burden of proof to support increased charges (47 U.S.C. § 204). In situations where more time for the investigation is needed because there have been substantial changes since the previous rate of return determination, the Act provides that the rates take effect following the maximum period of suspension, but that the rates may be subject to refund if after evidentiary hearings the Commission finds the rates to have been too high. (47 U.S.C. § 204).

The Court of Appeals for the District of Columbia Circuit has twice held—under the Communications Act and the cognate rate regulation provisions of the Natural Gas Act—that an agency has no authority to reject summarily or refuse to file carrier-made rate revisions without hearings on the lawfulness of the new rates. *Willmut Gas & Oil Co.* v. *FPC*, 294 F.2d 245 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 975 (1962); *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971).

In *Willmut*, a natural gas wholesaler made a series of rate increases, each time complying with the requirements of provisions of the Natural Gas Act that are analogous to the provisions of the Communications Act relating to carrier-initiated rate changes.[37] Each tariff revision was filed with the Federal Power Commission, suspended for the maximum statutory period, and became effective by operation of law at the end of that period, pending full hearing and investigation by the FPC and subject to refund at the conclusion of the investigation. When the FPC refused to reject the company's most recent tariff filing, a customer sought judicial review. The customer argued that the FPC has a broad statutory power to reject tariff filings and was required to reject this filing as unlawful on its face. The Court of Appeals expressly denied these contentions, concluding that the Commission has no authority to reject a company's filing of new rate schedules. 294 F.2d at 248-49. The court held:

> "[T]he Act provides for investigation of changed rates which have been filed; but it does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in rates, or that it may summarily reject or disallow the new schedule without a hearing." (*Id.* at 249.)

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[37] In the *AT&T Special Permission Case*, *supra*, 487 F.2d at 877-78, this Court recognized the applicability of the rationale and holding of *Willmut*, which "construe[s] a statutory plan for company initiated rate changes [under the Natural Gas Act] similar to that under the Communications Act". See Sections 4(e) and 5 of the Natural Gas Act (15 U.S.C. §§ 717c(e), 717d), which are analogous to Sections 204 and 205 of the Communications Act.

The court further held that the Commission's authority was statutorily limited to its powers of suspension, investigation, and prescription after full hearing and that the asserted power of rejection was inconsistent with the statutory scheme. *Id.* at 250-51. The statute does not authorize the Commission to reject a filing "on any ground appearing on its face". *Id.* at 250.

In *Associated Press* v. *FCC,* the Court of Appeals for the District of Columbia Circuit held that the FCC has no power to reject summarily a carrier-initiated tariff filing without holding hearings as to the lawfulness of the new rates. In that case AT&T had filed revised rates for its private line services, and several customers requested the Commission to reject the filing as patently unlawful. The FCC refused to reject the filing, and the rates became effective by operation of law pending the Commission's full investigation of their lawfulness.

The customers argued, *inter alia,* that the Commission was required to reject the tariff filing because it increased rates at a time when AT&T "was already earning in excess of its authorized rate of return. . . ." 448 F.2d at 1104. The Court of Appeals flatly repudiated this contention, holding that:

> "Whether the AT&T rates in general or the [private line] rates in particular are too high is a matter for the Commission to decide after investigation and hearing. *The Commission has no authority to reject rates summarily on the ground that they are unlawfully high.*" *Id.* (emphasis supplied).[38]

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[38] The court went on to say, "We know of no rule of law that a proposed rate increase must be rejected merely because the lawfulness of a prior rate increase has not been fully determined. Indeed, this court has held to the contrary." 448 F.2d at 1105.

The court in *Associated Press* cited with approval *North Carolina National Gas Corp.* v. *United States,* 200 F.Supp. 745, 750 (D. Del. 1961), where a three-judge District Court recognized that under the analogous regulatory scheme of the Interstate Commerce Act, "the ICC has . . . no power to reject a rate without a hearing."

The court thus held the Commission not to have the very authority it has sought to exercise in its instant rejection Order; *i.e.*, the authority to reject summarily a carrier's rate increases on the basis of a previous rate of return determination.

The Commission's novel interpretation here of its authority to reject summarily AT&T's carrier-made rates wholly disregards the congressional balance of interests embodied in the Communications Act. Under the rationale of the Commission's rejection Order, the "careful" statutory "balance" would last only until the Commission had made its first rate of return finding. Once such a finding was made, a carrier would forever after lose the right to initiate tariff revisions which would increase its rate of return. Regardless of changes in economic conditions, the carrier's filing could be rejected and the carrier required to participate in a full investigation, subject to no time limit whatever, before receiving special permission to file new rates. The provisions of the Communications Act involving carrier-initiated rates "would become superfluous if a carrier must seek Commission permission prior to filing rate revisions." *AT&T Special Permission Case,* 487 F.2d at 876. Accordingly, the Commission's instant rejection Order must be set aside as inconsistent with the fundamental plan of carrier-initiated rate regulation and as contrary to the express provisions of the Communications Act setting forth that plan.

II. THE COMMISSION'S PRIOR RATE OF RETURN FINDING CONSTITUTES NO LAWFUL BASIS FOR THE COMMISSION TO REJECT AT&T's JANUARY 3, 1975 TARIFF FILING.

The only statutory basis upon which the Commission may even arguably prevent a carrier from initiating rate changes is set forth in Section 205 of the Communications Act. That section provides that the Commission, after holding hearings and making the requisite findings, may prescribe the carrier's "charge or charges to be thereafter

observed" and may "make an order that the carrier . . . shall not thereafter publish, demand or collect any charge other than the charge so prescribed. . . ." 47 U.S.C. § 205(a). The Commission itself acknowledges Section 205 as the only statutory basis for its rejection Order of March 4, 1975 (FCC's Motion to Transfer, p. 2).

A. The Commission Did Not Previously Prescribe Rates Within the Meaning of Section 205 of the Communications Act.

The Commission's authority to prescribe rates is expressly limited in the statute; a valid prescription can be made only "after full opportunity for hearing" and upon a finding that the rates so prescribed are "just and reasonable." 47 U.S.C. § 205(a); see *AT&T* v. *FCC*, 449 F.2d 439, 450 (2d Cir. 1971); *National Ass'n of Motor Bus Owners* v. *FCC*, 460 F.2d 561, 563-64 (2d Cir. 1972); *AT&T Special Permission Case*, 487 F.2d at 874-75; *AT&T* v. *FCC*, 503 F.2d 612, 617 (2d Cir. 1974). The Commission did not purport to prescribe rates in its Docket 19129 Decision, but undertook only to determine the allowable rate of return on Bell's interstate operations under then-current economic conditions. 38 F.C.C.2d 213, 251 (1972).[39]

Indeed, in the rejection Order here under review the Commission conceded that its Docket 19129 Decision did not prescribe "rates" or a "specific rate structure" and that the tariff changes filed by AT&T thereafter have been "carrier-made" rates. Order, para. 17 and n. 14 (A. 10).

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[39] In contrast, when the Commission has prescribed charges or maximum charges pursuant to Section 205, it has done so in unequivocal language. See, e.g., *Western Union Telegraph Co.* 27 F.C.C.2d 515, 549 (1971):

> "[T]he rates for Telex Service and Public Message Telegraph Service presently contained in the tariffs of Western Union are PRESCRIBED by the Commission as the maximum reasonable rates for such services under Section 205 of the Communications Act, and no increase in such rates shall be made effective without prior permission of the Commission."

Clearly, then, the Commission cannot and does not now contend that it prescribed rates in 1972. To prescribe rates, the Commission must make the "essential" statutory finding that the rates are "just and reasonable." *AT&T* v. *FCC*, 449 F.2d 439, 450 (2d Cir. 1971). The Commission in its Docket 19129 Decision merely reaffirmed that "we propose to allow such increased rates to go into effect pending a final determination of the lawfulness thereof" in the second phase of Docket 19129 and in another Commission proceeding. 38 F.C.C.2d at 247. The Commission declined to make the "just and reasonable" finding requisite to a prescription of rates.[40] Indeed, it imposed accounting and contingent refund obligations on the rates filed after the Docket 19129 Decision "until all questions of lawfulness are resolved." 42 F.C.C.2d at 301; see 38 F.C.C.2d at 251.

This Court has stated: "Under § 205(a) the Commission cannot prescribe a rate without finding that the rate prescribed is just and reasonable. The Commission here made no such finding . . . but on the contrary expressly disclaimed making any such finding." *AT&T* v. *FCC*, *supra*. 449 F.2d at 451.[41] Thus the Commission did not and could not prescribe rates in its Docket 19129 Decision. Rather, all rates filed by AT&T since that 1972 decision have been

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[40] Thus, in its opinion denying reconsideration the Commission expressly refused to make a finding as to the lawfulness of AT&T's rates (42 F.C.C.2d at 301):

> "[W]e did not find as a matter of law that [AT&T's] new rate schedules were just, reasonable and free of undue discrimination within the meaning of Sections 201-202 of the Communications Act, and we specifically reserved the resolution of all such questions to further hearings."

[41] In addition, Section 205 requires that a carrier be afforded "full opportunity for hearing" before its rates can be prescribed, but Phase I of Docket 19129 was limited to the question of what overall return was fair for Bell's interstate operations at that time. Still pending in Phase II are such key issues as what investment base that percentage return is properly applied to in arriving at Bell's ultimate interstate revenue requirement. Until these Phase II issues are concluded, Bell clearly has not been afforded the "full opportunity for hearing" required by Section 205.

carrier-made. The Commission therefore cannnot justify its rejection Order on the ground that the January 3, 1975 tariff filing on its face violated a previous rate prescription.

B. A Rate of Return Finding for a Past Period Does Not Prevent a Carrier from Initiating Rate Changes.

1. A determination of rate of return is not a "prescription" of a carrier's "charges to be thereafter observed" within the meaning of Section 205 of the Communications Act.

While the Commission has conceded that it has not prescribed AT&T's "rates" or "specific rate structure," it claims that a rate of return finding has the same effect as a "prescription." Order, paras. 16, 17 and n. 14 (A. 9, 10). On the contrary, the Commission's rate of return finding in 1972 was not a prescription of "charges to be thereafter observed" within the meaning of Section 205 of the Communications Act. There is no statutory authority for the Commission to "prescribe" a prospective rate of return that would prevent a carrier from initiating rate changes.

Section 205(a) does not refer to the prescription of a rate of return. That section authorizes the Commission to "prescribe what will be the just and reasonable *charge* or the maximum or minimum, or maximum and minimum, *charge* or *charges* to be thereafter observed. . . ." (emphasis supplied). The concepts of "rate of return" and "charge" are fundamentally different. Whereas a "charge" is an identifiable price—the specific amount of money which a customer pays and the carrier collects for a service—the rate of return (cost of capital) of a carrier may continuously change, depending on economic and financial conditions.[42]

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[42] The Commission has stated: "Rate of return in simplest terms is a percentage expression of the cost of capital. It is just as real a cost as that paid for labor, material, and supplies, or any other item necessary for the conduct of business." 9 F.C.C.2d 30, 51 (1967), cited at 38 F.C.C.2d 213, 226 (1972). That is, rate of return is a calculation based on a carrier's capital structure, cost of equity, and cost of debt, each of which is subject to continuous change depending on financial conditions.

The Commission and the courts have consistently treated "rate of return" and "charges" as distinct; rate of return (cost of capital) constitutes but one of many ingredients (like labor and other operating costs) that enter into the determination of a carrier's appropriate charges.[43]

At the time the Communications Act of 1934 was enacted, the concept of a rate of return was well established, and the term "rate of return" was common parlance in connection with regulated utilities.[44] Yet despite this recognized term in regulatory practice, Congress chose only to authorize the Commission to prescribe "charges, classifications, regulations and practices." Congress did not intend to authorize the Commission to prescribe a rate of return (cost of capital) to be thereafter observed.

The Commission has consistently treated the term "charges" in Section 205 of the Act as synonymous with the specific rates contained in a carrier's tariff schedules.[45] The courts have also interpreted the term "charges" to be the same as rates. Thus, in *AT&T* v. *FCC*, 449 F.2d 439, 450 (2d Cir. 1971), the Court spoke of "[t]he Commission's

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[43] See, *e.g.*, 2 F.C.C.2d 871, 872-74 (1965); 9 F.C.C.2d 30, 33 (1967); 27 F.C.C.2d 151, 157, 161-62 (1971).

[44] See, *e.g.*, *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U.S. 256, 268 (1919). It is apparent from other early federal and state cases that the concept of a utility's rate of return was well-entrenched prior to the enactment of the Communications Act in 1934. See *United Rys. & Electric Co.* v. *West*, 280 U.S. 234, 249-52 (1930); *Banton* v. *Belt Line Ry.*, 268 U.S. 413, 425 (1925); *Annotation* to *United Rys. & Electric Co.* v. *West*, 74 L.Ed 390, and cases cited therein.

[45] Thus, when the Commission invoked its prescription authority under Section 205 in *Western Union Telegraph Co.*, 27 F.C.C.2d 515, 549 (1971), it ordered that "the *rates* . . . presently contained in the tariffs of Western Union are PRESCRIBED by the Commission as the *maximum reasonable rates* . . . under Section 205 of the Communications Act, and no increase in such *rates* shall be made effective without prior permission of the Commission." (Emphasis supplied.) Indeed the Commission used "charges" and "rates" interchangeably in the Docket 19129 Decision itself, distinguishing both from "rate of return." See, *e.g.*, 38 F.C.C.2d at 215-17, 226, 245-47.

authority to prescribe *rates* and practices [which] is derived from § 205(a) of the Communications Act" (emphasis supplied). In other cases the courts have repeatedly used the statutory term "charges" as the equivalent of specific rates. See *e.g., AT&T* v. *FCC, supra,* 503 F.2d at 614; *AT&T* v. *FCC, supra,* 487 F.2d at 871-72; *National Ass'n of Motor Bus Owners* v. *FCC, supra,* 460 F.2d at 563.

An examination of the statutory provisions of the Communications Act makes it clear that rate of return cannot be read as synonymous with "charges." Section 205(a) itself refers to a Commission prescription order which requires that the carrier not "thereafter publish, demand, or collect any charge other than the charge so prescribed. . . ." A carrier "publishes" its tariff schedules showing its *rates,* not its rate of return; a carrier "demands" and "collects" specific *rates,* not a rate of return.

Section 203(a) of the Communications Act requires carriers to "file with the Commission . . . schedules showing *all charges*" (emphasis supplied). 47 U.S.C. § 203(a). Section 203(c) provides that a carrier shall not "charge, demand, collect, or receive a greater or less or different compensation [for communication service] than the *charges* specified in the schedule then in effect . . ." 47 U.S.C. § 203(c) (emphasis supplied). Similarly, Section 204 sets out the Commission's authority for processing "charges" which have been "filed with [the] Commission" pursuant to Section 203. 47 U.S.C. § 204.

The schedules of charges that are filed with the Commission, pursuant to these provisions, consist of printed material setting forth each specific *rate* (in "dollars and cents") charged by a carrier for each particular type of service.[46] A schedule merely containing a statement of the

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[46] Commission Rule 61.55, which sets forth the "Composition of tariffs," provides that a carrier's filed tariffs shall contain "[a]n explicit statement of the charges in cents or in dollars and cents of United States currency, per chargeable unit of service for all communication services, together with a list of the cities, towns, and localities to and from which message rates apply, all arranged in a simple and systematic manner." 47 C.F.R. § 61.55(h).

carrier's allowable percentage "rate of return" clearly would not comply with the statute. Thus "maximum charges" within the meaning of Section 205 can only mean the highest specific rates which a carrier may include in a published tariff schedule filed pursuant to the other rate regulation sections of the Act.

Furthermore, when a "charge" is prescribed under Section 205, specific legal consequences flow from the Commission's act of prescription. The charges filed in accordance with the Commission's prescription are not "carrier-made rates" but are "agency-made rates." Under the doctrine of *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932), such prescribed agency-made rates have "the force of a statute" and are not subject to refund or reparations in the future. *Id.* at 386, 390.[47] A carrier is "bound to conform" to agency-prescribed rates, and in return the carrier is protected from the agency's later declaring the rates to be unlawful. *Id.* at 387.

The Commission's asserted power in its rejection Order to "prescribe" a rate of return would withdraw this protection. Although required to adhere to a rate of return level, the carrier would still be at its peril in initiating rate changes, subject to refund and reparation orders, because the rates filed were "carrier-made." See Order, para. 17, n. 14 (A. 10). The statutory scheme does not allow the Commission to bar a carrier from initiating rate increases and at the same time withhold from the carrier the protection

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[47] As the Supreme Court recognized in *Arizona Grocery*, agency-made rates are promulgated in exercise of the Commission's delegated legislative power, and must be made in compliance with statutory requirements. 284 U.S. at 387-88. A carrier is "bound to conform" to agency-made rates. *Id.* at 387. On the other hand, a carrier is free to change carrier-made rates "and take its chances on an adjudication that the substituted rate will be found unreasonable." *Id.* at 387-88. See *Public Utilities Commission* v. *United States*, 356 F.2d 236, 239-40 (9th Cir.), *cert. denied*, 385 U.S. 816 (1966), for a discussion of the distinction between carrier-made rates and FCC-prescribed rates.

of prescribed agency-made rates. The Commission's action in its Docket 19129 Decision making AT&T's rates subject to a refund obligation in the event they are subsequently found unlawful is plainly inconsistent with the exercise of any "prescription" authority under Section 205 of the Act.

Moreover, a Commission finding that a rate of return was "just and reasonable" does not mean that there was a Commission "prescription" within the meaning of Section 205. And the fact that the Commission in 1972 allowed AT&T to file for a general rate increase in order to achieve an improvement in its overall earnings level does not constitute a "prescription" that prevents changes in carrier-made rates.

It has consistently been held that agency approval of a general increase in the level of rates is not a statutory "prescription" that bars changes in rates. Thus, the Supreme Court held that rates are carrier-made despite agency statements that the general revenue increases allowed by the agency are "just and reasonable" and are "not shown to be otherwise unlawful." *ICC* v. *Inland Waterways Corp.*, 319 U.S. 671, 685-87 (1943).[48] The Court stated that such findings have "been held by the [Interstate Commerce] Commission not to constitute an approval or a prescription of the rates. . . . Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations." *Id.* at 686-87. To the same effect is *Atlantic City Electric Co.* v. *United States,* 306 F. Supp. 338 (S.D.N.Y. 1969), *aff'd by equally divided Court,*

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[48] See also *Brimstone RR. & Canal Co.* v. *United States,* 276 U.S. 104, 122 (1928), where the Supreme Court said that "mere general permission or suggestion concerning rates . . . without consideration of the reasonableness of any particular rate, is not the 'finding or order' referred to by § 15(6) [of the Interstate Commerce Act]. We think that refers to one which after full hearing, determined and prescribed a rate thereafter to be observed. The contrary view would . . . destroy the practical value of the distinction which Congress carefully preserved." See also *Baltimore & O. RR.* v. *Alabama Gt. So. RR.,* 506 F.2d 1265, 1268 and n. 14 (D.C. Cir. 1974).

400 U.S. 73 (1970),[49] where the ICC had issued an order authorizing the carriers to put into effect general rate increases. The three-judge District Court stated:

> "The new rates were 'carrier-made,' that is to say, the Commission merely authorized the railroads to put the increases into effect, it did not require or prescribe them. It is true that the Commission found these general increases, on an overall basis, to be just and reasonable. But the Commission did not purport to pass upon individual rates as contrasted with the general level. It neither prescribed nor specifically authorized a particular rate on a particular commodity. . . ." (306 F. Supp. at 341)[50]

Thus, to constitute a "prescription" within the meaning of Section 205 of the Communications Act, the Commission must deal with specific rates. The mere authorization of a general increase in rates—or even a finding that a particular earnings level is "just and reasonable"—is not a Section 205 prescription.

2. A rate of return determination is not binding prospectively without regard to changes in economic and financial conditions.

As we have shown, Section 205 of the Act is the only authority upon which the Commission can bar carrier-initiated rate changes, and a finding of rate of return for a past period in no sense constitutes a prescription of "charges" under that section. The Commission's 1972 rate of return determination of 8½ percent as the minimum allowable rate of return applicable to the 1971-72 test period cannot be binding indefinitely into the future.

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[49] The question on appeal was whether the court had jurisdiction at all to review the ICC order. It was uncontested on appeal that the rates were carrier-made and thus subject to reparations and refund.

[50] See also *Alabama Power Co.* v. *United States*, 316 F. Supp. 337, 338 (D.D.C. 1969), *aff'd by equally divided Court*, 400 U.S. 73 (1970); *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd*, 352 U.S. 1021 (1957); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935).

Heretofore, the limited applicability of a rate of return determination has never been disputed. The Supreme Court has repeatedly recognized that since a rate of return finding is based on economic and financial conditions at a given point in time, "what would have been a proper rate of return for capital invested in [public utilities] a few years ago furnishes no safe criterion for the present or for the future." *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U.S. 256, 268 (1919). In *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U.S. 679, 693 (1923), the Supreme Court reiterated that "[a] rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally."[51]

The FCC's prior practice and administrative construction of the Communications Act reflect this principle that a rate of return finding in a past period cannot be binding for future conditions so as to prohibit carrier-initiated rate changes. The Commission has recognized that changing economic and financial conditions have a critical impact upon a carrier's required rate of return. Until now the Commission has accepted new tariffs for filing even though the new rates admittedly produced earnings beyond the level of a previously authorized rate of return.

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[51] See also, *United Rys. & Electric Co.* v. *West*, 280 U.S. 234, 249 (1930), where the Supreme Court stated: "What is a fair return . . . cannot be settled by invoking decisions of this court made years ago based upon conditions radically different from those which prevail today. The problem is one to be tested primarily by present-day conditions. Annual returns upon capital and enterprise, like wages of employees, cost of maintenance and related expenses, have materially increased the country over. This is common knowledge. A rate of return upon capital invested in . . . public utilities which might have been proper a few years ago no longer furnishes a safe criterion either for the present or the future." See also *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 604-05 (1944); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 596-97 (1942).

In 1967 in its Docket 16258 proceeding, the Commission "specified" AT&T's allowable rate of return, under then existing conditions, to be in the range of 7 to 7½ percent. 9 F.C.C.2d 30, 88, 116 (1967); 9 F.C.C.2d 960, 963-64 (1967).[52] But despite the fact that it "specified" a rate of return, the Commission made it plain that such a return determination related "to the situation disclosed by the record for the test period" and "cannot be binding for different conditions." 9 F.C.C.2d at 963. The Commission also stated (9 F.C.C.2d at 964):

> ". . . it should be clear that the 7-7½ percent range is applicable only so long as the conditions obtaining during the test period continue and that these figures do not represent either an absolute floor or ceiling, but are subject to revision as circumstances change."[53]

In 1970 AT&T filed rate increases designed to raise its earnings substantially above the rate of return level determined in 1967. Recognizing the right of a carrier to initiate rate changes which exceeded a previously specified return level, the Commission accepted the filing and, pursuant to Section 204 of the Act, ordered an investigation in Docket 19129 of AT&T's claim to a higher earnings level.[54] 27 F.C.C.2d 149 (1971); 27 F.C.C.2d 151 (1971).

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[52] The Commission stated that the rate changes filed by AT&T "will bring the level of interstate earnings appropriately within the range of reasonableness we have *specified*, i.e., 7 to 7.5 percent . . . ." (emphasis supplied). 9 F.C.C.2d at 116.

[53] In a subsequent decision, the Commission held that its action with respect to AT&T's tariff filing pursuant to the 1967 rate of return finding in Docket 16258 does not "constitute approval or *prescription* of such schedules" (emphasis supplied). *State of New Jersey, et al.*, 12 F.C.C.2d 833, 834 (1967).

[54] While the Commission requested that AT&T agree to a voluntary postponement of the full amounts of the filed increase (see p. 5 n. 4, *supra*), the amount of the increase AT&T did file in January 1971 still resulted in a rate of return that significantly exceeded the 1967 range of 7 to 7½ percent. See 27 F.C.C.2d at 153-54; 38 F.C.C.2d at 215, 249.

When the Commission instituted its investigation in Docket 19129, it stressed that "changes occurring in the capital structure and the costs thereof of AT&T subsequent to the 1967 decision, particularly the net increase in embedded cost of debt, were of particular importance," and recognized that "changes had taken place in the various elements which make up the cost of capital since the Commission's 1967 decision in Docket No. 16258." 27 F.C.C.2d at 154-55.

Thus, not until its rejection Order of March 4, 1975, did the Commission ever treat a rate of return finding for a past period as a bar to the initiation of carrier-made rates. The Commission is now attempting to re-interpret the language and import of its 1972 rate of return finding in order to support a claimed power which the Commission has neither exercised nor even hypothesized during all the years of its administration of the Communications Act. The sharp contrast between the Commission's past practice and its "more recent *ad hoc* contention" strongly argues against the existence of the asserted power. *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 395-96 (1956); *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 279-81 (1966). When the Commission departs from a long-standing construction of the Act, it may do so only upon a clear showing of statutory authority or judicial precedent supporting the change. Here, however, the Commission has failed to show any basis for its novel claim that rate of return can be "prescribed" so as to bar a carrier from initiating changes in carrier-made rates.[55]

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[55] Under an analogous statutory scheme of regulation, the Federal Power Commission does not construe a rate of return finding for a past period to bar a regulated company from subsequently filing tariffs designed to exceed that return level. See, *e.g.*, *Southern Natural Gas Co.*, 44 F.P.C. 567, 569-70, 576 (1970), where the FPC's prior rate of return finding was 6.5% and the company's tariff revisions were designed to raise its rate of return to 8.5%. The tariff revisions were filed, suspended by the Commission, and

(footnote continued on following page)

Even in its Docket 19129 Decision, the Commission did not purport to prescribe a prospective rate of return "to be thereafter observed" or cite any statutory authority suggesting that it was exercising such a prescription power.[56] The 1972 decision shows that the rate of return finding related to then-existing (1971-72) conditions (see pp. 5-6, *supra*). The Commission stated that 8.5 to 9.0 percent was the return that "Bell should be permitted to earn on its interstate operations at this time" 38 F.C.C.2d 213, 245 (1972).[57] And it explained that its determination represented the rate of return "warranted under current and immediately foreseeable economic and financial circumstances." *Id.* at 227.

(footnote continued from preceding page)
became effective at the end of the suspension period pending completion of the Commission's investigation. See also, e.g., *Pacific Gas Transmission Co.*, 43 F.P.C. 837 (1970); *Panhandle Eastern Pipeline Co.*, 40 F.P.C. 98 (1968). In such cases, although the FPC had made a prior rate of return finding for the regulated company, it accepted for filing subsequent tariff revisions based on a higher rate of return; the rate changes were not rejected but were merely suspended for the statutory period and made subject to investigation.

[56] The Commission first used the term "prescription" in an entirely different context in its order denying various petitions for reconsideration, eight months after the Docket 19129 Decision. 42 F.C.C.2d 293, 300 (1973). However, even in the two sentences in that opinion where it loosely referred to a "prescription" of rate of return, the context makes it clear that the Commission was not referring to a statutory prescription within the meaning of Section 205 of the Communications Act (see p. 7 n. 9, *supra*).

[57] Furthermore, the Commission noted that a rise in AT&T's future earnings to 9.0 percent would "be acceptable without regulatory action on our part." 38 F.C.C.2d at 245. Thus, even if there were no changes in economic conditions from those prevailing in 1972, the Commission suggested that it would not institute any action on its own (such as under Section 403 of the Act) if Bell's interstate earnings reached the 9 percent level.

Since 1972, there have been dramatic changes in financial and economic conditions that have substantially increased Bell's cost of capital (see pp. 8-10, 12, *supra*).[58] These changes were fully documented in the supporting materials submitted with the January 1975 tariff filing, and the Commission itself stated that it is "cognizant of the general changes and trends in the national economy." Order, para. 19 (A. 10).

Nevertheless, while recognizing that substantial changes in economic conditions have occurred over the past two years, the Commission in its rejection Order embraced the untenable concept of a "prescribed" rate of return. To prevent a carrier from filing rate changes designed to improve its earnings to a level commensurate with current conditions in the capital markets is to undermine the very basis of the statutory plan of carrier-initiated rates. The Communications Act reflects Congress' concern that regulated utilities be able to respond promptly to changed conditions, and the consuming public has a "vital stake" in ensuring that the Commission follow the statutory plan.[59] AT&T's January 1975 tariff filing, seeking to improve its rate of return, was a valid exercise of its statutory right to meet current financial realities by initiating rate increases, and the Commission's rejection of that filing was contrary to the terms and intent of the Communications Act.

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[58] For example, the Commission's finding as to the "current cost of equity" in 1972 was premised on long-term interest rates no higher than 7¼ to 7½ percent. 38 F.C.C.2d at 231. In contrast, interest costs on Bell's long-term debt have averaged in excess of 9 percent over the past year. (A. 20, 71). For a summary of other significant changes in financial and economic conditions since the 1972 decision, see A. 67-74.

[59] See discussion at pp. 24-25, *supra*.

CONCLUSION

The statutory plan of the Communications Act provides the Commission with explicit powers and procedures for regulating carrier-initiated rate changes and its authority is governed by the specific provisions of Sections 203-205 of the Act. The Commission has no authority to prevent carriers from initiating changes in carrier-made rates. *United States* v. *SCRAP,* 412 U.S. 669 (1973); *American Telephone & Telegraph Co.* v. *FCC,* 487 F.2d 865 (2d Cir. 1973); *Associated Press* v. *FCC,* 448 F.2d 1095 (D.C. Cir. 1971); *Willmut Gas & Oil Co.* v. *FPC,* 294 F.2d 245 (D.C. Cir. 1961) *cert. denied,* 368 U.S. 975 (1962). Sustaining the Commission's claimed power to "prescribe" a rate of return and to reject summarily a carrier's tariff filing designed to exceed that return would contravene the careful balance of interests reflected in the Communications Act.

For the foregoing reasons, the Commission's Order rejecting petitioner's tariff revisions filed on January 3, 1975, should be enjoined, set aside, and annulled. The Court should direct the Commission to accept the filing of the tariffs. 28 U.S.C. §§ 1651, 2342. Since the rates were filed to be effective March 4, 1975, and since the Commission could have suspended the tariff filing for a maximum statutory period of three months, the tariffs would have been effective by operation of law on June 4, 1975, at the very latest, were it not for the Commission's rejection Order. Accordingly, to provide appropriate relief the Court's order should direct the Commission to permit

AT&T to place its proposed new rates into effect without further delay.[60]

Respectfully submitted,

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May 2, 1975

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[60] This Court's decree in the *AT&T Special Permission Case* stated: "[S]ince the action of the Commission already has delayed the filing and effectiveness of the . . . tariff revisions substantially longer than the maximum notice and suspension periods provided by the Act, the Commission is ordered to accept such tariffs and to permit AT&T to place them in effect immediately under the procedure which the Act authorizes the proponent of a new tariff to follow at the termination of the three month suspension period." 487 F.2d at 881.

ADDENDUM

Specified Provisions of the
Communications Act of 1934, as amended

Section 203, 47 U.S.C. § 203, provides:

> (a) Every common carrier, except connecting carriers, shall within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.
>
> (b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a

general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

Section 204, 47 U.S.C. § 204, provides:

Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice,

enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 205, 47 U.S.C. § 205, provides:

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation

and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

CERTIFICATE OF SERVICE

I, Jules M. Perlberg, certify that I served copies of the Petitioner's Brief and the Joint Appendix this 2nd day of May, 1975, by mail, postage prepaid, on the Federal Communications Commission, the United States of America, and each of the intervenors in No. 75-4046, as set forth in the attached list.

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